Supreme Court, U.S.
FILED

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No:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DOROTHEA O'DRISCOLL,

Petitioner,

vs.

HERCULES, INC., a Delaware Corporation, JOHN F. BAKER and EDWARD D. McDONALD,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIUS DABNEY
Attorney of Record for Petitioner
350 South 400 East, Suite 202
Salt Lake City, UT 84111
Telephone: (801) 328-9000

PHILLIP B. SHELL
45 East Vine Street
Murray, UT 84107
Telephone: (801) 262-6800

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QUESTION PRESENTED FOR REVIEW

Does an employee forfeit all remedies under the Age in Discrimination Act and Title VII of the Civil Rights Act of 1969 where, by virtue of after acquired evidence, it is found she commited serious misconduct in initially obtaining employment, despite her claims of unlawful discrimination by her employer in her discharge?

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Petitioner is not aware of any parent companies or nonwholly owned subsidiaries of Hercules, Inc.

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OPINIONS DELIVERED IN THE CASE BY LOWER COURTS

The opinion of the District Court in this matter is reported as O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990).

The opinion of the Tenth Circuit Court of Appeals was issued on January 5, 1994 and was noted for publication.

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STATEMENT OF JURISDICTION

The final decision of the Tenth Circuit Court of Appeals to which this petition is taken was issued January 5, 1994. It affirmed the decision of the United States District Court for the District of Utah which granted the Defendant's/Respondent's motions for summary judgment.

This Court has jurisdiction to hear this matter based on 28 USC §1254(1).

STATEMENT OF THE CASE

1. In 1978 the Petitioner, Mrs. O'Driscoll, applied for employment at Hercules. In the employment application she revealed her true age of 49 years. She was never contacted for an interview nor offered a job.

2. In September of 1979 the Petitioner applied again at Hercules for a job. She listed her birth date as being 7/7/34 instead of her actual birth date of 7/7/29. She also listed the ages of her children to be several years younger than their actual ages. Other related facts were changed to be consistent with the falsified birth date. She also indicated on the employment application that she had never applied for a job at Hercules before.

3. The Petitioner was offered employment following her September 1979 application and began work on January 7, 1980. She continued to work for over six years for the company, until April 25, 1986, when her employment was terminated by Hercules.

4. Following her termination she sued Hercules in the United States District Court for the District of Utah for age discrimination, unlawful termination under Title VII based on retaliation for making charges and objections against her employer for various unlawful practices and actions, and other claims related to the termination of her employment by the company. During the pre-trial discovery process, while her deposition was being taken, it was revealed by the Petitioner that she had provided false information in her employment application and other related forms with respect to her age, birth dates of her children, amount of education, and other matters.

5. The Respondents thereafter brought a motion for summary judgment. The District Court relied on the case of Summers v. State Farm Mutual Automobile Ins. Co., 864 F.2d 700 (10th Cir. 1988) in granting summary judgment for the Respondents. It didn't reach the question

of whether the employer wrongfully discriminated against her. Rather, it held that she had no remedy under the law because the company would have had an independent basis for terminating the Petitioner because of her serious misrepresentations at the time she applied for and began her employment, even though these matters were unknown at the time of the discharge.

6. The Tenth Circuit Court of Appeals upheld the determination of the District Court in light of its prior decision in the Summers case.

7. This action was initiated in the United States District Court for the District of Utah. It was based on allegations that Respondent Hercules, Inc. violated, among other things, the Age Discrimination in Employment Act and Title VII of the Civil Rights Act. The District Court had jurisdiction over these claims pursuant to 29 U.S.C. §626 and 42 U.S.C. §2000e-5 (f) respectively.

ARGUMENT

This Court should grant this petition for writ of certiorari because the Tenth Circuit's reliance on the case of Summers v. State Farm Mutual Automobile Ins. Co., 864 F.2d 700 (10th Cir. 1988) is misplaced in light of the underlying policy inherent in the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. and Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et seq. It is also at odds with this Court's prior decisions in such cases as Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 5 L. Ed. 2d 471 (1977).

The Summers case stands for the rule in the Tenth Circuit, and other circuits which have followed Summers, that a discharged employee who brings suit for unlawful discrimination in the discharge has no remedy at all if it is found that there would have been an independent nondiscriminatory basis for the discharge, based on subsequently discovered misconduct by the

employee in obtaining the job or in the course of performing job duties.

The purpose of Title VII, for example, has been "to achieve equality of employment opportunity" by giving employers incentives "to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, employment discrimination." See Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S. Ct. 849, 852-53, 28 L. Ed. 2d 158 (1971) and United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973).

To allow the Summers rule to stand does not give employers the mandate to eliminate discrimination in the work place. Rather, it provides a windfall to employers who have wrongfully discriminated against an employee, but who are later able to turn up some independent basis for termination, such as resume fraud or other misconduct. By this they avoid any liability for their discriminatory conduct. By

the Summers rule, the District Court will never get to the point of determination of whether unlawful discrimination has occurred. The objective of eliminating unlawful discrimination in the work place and punishing employers for its occurrence is thwarted.

The sound public policy of deterring discrimination in the work place should be encouraged. However, employers also need the necessary latitude in dealing with employee misconduct. Both goals can be accomplished by overruling Summers and imposing in its place an analysis that first examines whether a violation has occurred, and if so, a consideration of whether, in light of discovered misconduct, the employee is entitled to relief, and if so, to what extent. See, for example, Smith v. General Scanning, 876 F.2d 1315 (7th Cir. 1989).

If there has been unlawful discrimination in the work place, then the discharged employee who is found by virtue of after acquired

evidence to have been guilty of misconduct in obtaining or performing the job is worse off by the application of Summers than if the discrimination had not taken place at all, because, without the discrimination, he or she would have continued on the job. Here, a plaintiff is left with no job and no remedy.

The issue is important as Summers has been applied in the Sixth and Seventh Circuit Courts of Appeals[1], as well as in various district courts throughout the nation. Only the Eleventh Circuit Court of Appeals has rejected it. See Wallace v. Dunn Construction Co., Inc., 968 F.2d 1174 (11th Cir. 1992).

In reaching its decision, the Tenth Circuit Court in Summers relied heavily on this Court's decision in Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 5

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[1]See Johnson v. Honeywell Info Sys., 955 F.2d 409 (6th Cir. 1992) and Washington v. Lake Co., 969 F.2d 250 (7th Cir. 1992).

L. Ed. 2d 471 (1977). However, we submit that it misapplied the Mt. Healthy principle and went impermissibly beyond its holding. In Mt. Healthy, the employer claimed there were two reasons for the plaintiff's discharge-- his protected speech rights under the First Amendment and his use of obscene gestures toward students. Id. at 283 n. 1, 97 S. Ct. at 574 n 1. This Court held that if the plaintiff met his burden of showing that his exercise of his First Amendment rights was a "substantial factor" in the decision to refuse to rehire him, then the school board would avoid liability only if it could show "that it would have reached the same decision... even in the absence of the protected conduct." Id. at 287, 97 S. Ct. at 576. The Court found that the constitutional principle at stake would be sufficiently vindicated if such an employee were placed in no worse a condition than if he had not engaged in the conduct. Id. at 285-86, 97 S. Ct. at 575.

The problem with the Summers decision, as here with the Petitioner, is that the Summers rule ignores the length of time between the employment termination decision and the discovery of a legitimate basis for the termination during trial preparation. The employer is excused from all liability based on what hypothetically would have occurred had it known of the improper conduct of the employee at the time it actually discharged the employee, rather than months or years later during the litigation. Here the Petitioner would have remained employed for some time after her actual discharge absent the alleged age discrimination and retaliation. She is left in worse a position then if she had not been a member of a protected class by virtue of her age or her objections to her employer of improper actions, assuming those allegations are proven at trial.

That is the problem with the Summers decision, which the Tenth Circuit relied on in

affirming the District Court's award of summary judgment for the Respondent. It is at odds with Mt. Healthy and the public policy purposes of Title VII and the Age Discrimination in Employment Act of discouraging discrimination in the work place.

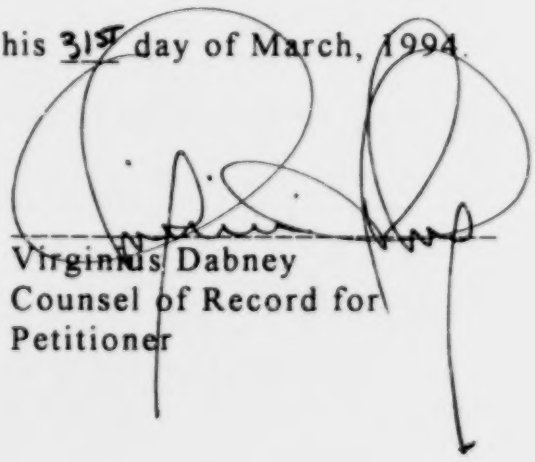
This Court recently decided the case of ABF Freight System, Inc. v. National Labor Relations Board, 510 U.S. ___, 127 L. Ed. 152, 114 S. Ct. ___ (1994). Although that case involved issues concerning the NLRB, it involved an employee who lied before a tribunal and this Court granted certiorari for the issue of determining whether "an employee forfeit(s) the remedy of reinstatement with back pay after the Administrative Law Judge finds that he purposefully testified falsely during the administrative hearing?" Id. 127 L. Ed. at 159. The main issue is similar to the Petitioner's, did his misconduct disqualify him for a remedy under the law?

This Court recognized the Board's conclusions in ABF that punishing employers who wrongfully discriminate against employees "promotes a vital public interest." Id. 127 L. Ed. at 160. Lying to get or keep a job should not be condoned, but neither should employers be protected who discriminate against their employees.

The Summers case should be overruled, and the affirmance of the dismissal of this case should be reversed.

For these reasons, we respectfully ask this Court to grant certiorari and examine these issues.

Submitted this 31ST day of March, 1994.



Virginius Dabney
Counsel of Record for
Petitioner

APPENDIX

1. January 5, 1994 Order of the Tenth Circuit Court of Appeals.

2. Memorandum Decision and Order of the United States District Court for the District of Utah, dated July 2, 1990.

3. Judgment of July 27, 1990 for Defendants/Respondents against Plaintiff/Petitioner on Plaintiff's First, Third and Fifth claims in the second amended complaint.

4. Judgment of November 13, 1990 disposing of all of Plaintiff/Petitioner's claims against the Defendants.

5. August 27, 1992 Order Certifying Judgment Entered July 27, 1990 and Judgment Entered November 13, 1990 Final Under Fed R. Civ. P. 54(b).

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DOROTHEA O'DRISCOLL,

Plaintiff-Counter-Defendant-Appellant,

vs.

No. 92-4164

HERCULES INC., a Delaware corporation; JOHN F. BAKER; EDWARD D. McDONALD,

Defendants-Counter-Claimants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 89-CV-297W)

Phillip B. Shell of Day & Barney, Murray, Utah, for Plaintiff-Counter-Defendant-Appellant.

Keith E. Taylor (Spencer C. Austin, Douglas R. Davis with him on the brief), of Parsons, Behle & Latimer, Salt Lake City, Utah, for Defendants-Counter-Claimants Appellees.

Before BALDOCK, BARRETT, and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Dorothea O'Driscoll appeals the district court's grant of summary judgment in favor of Defendants. The district court certified the judgment in this multiple-claim litigation under Fed. R. Civ. P. 54(b), and we exercise jurisdiction pursuant to 28 U.S.C. Section 1291.

Plaintiff was employed as a Quality Control Inspector for Hercules, Inc. Bacchus Works in Magna, Utah ("Hercules") from

January 7, 1980 until she was terminated on April 25, 1986. Upon termination, Plaintiff filed suit against Hercules and other alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. Section 621-634, Title VII of the Civil Rights Act of 1964, 42, U.S.C. Section 2000e, the Fair Labor Standards Act, 29 U.S.C. Section 201-219, as well as violations of state law including breach of employment contract and wrongful termination.

While preparing for trial, Hercules discovered evidence of misconduct on the part of Plaintiff that it was unaware of when it terminated Plaintiff. The uncontroverted after-acquired evidence of misconduct included the following: (1) on her employment application, Plaintiff misrepresented her age so as to appear five years younger, falsely represented that she had never previously applied for employment with Hercules, and failed to disclose a previous employer; (2) on

her pre-employment forms, Plaintiff misrepresented her age, date of graduation from high school, ages of her children, and falsely represented that she had completed two quarters of study at Salt Lake City Technical College; (3) on her application for membership with Blue Cross-Blue Shield of Utah, Plaintiff misrepresented the age of her son, who would have been otherwise ineligible for coverage as Plaintiff's dependent; and (4) on her "Application and Authorization for Access to Confidential Information" ("Security Clearance"), a United States Government form, Plaintiff misrepresented her age.

In support of its motion for summary judgment, Hercules provided evidence of the foregoing misrepresentation made by Plaintiff as well as a copy of Plaintiff's employment application which contained the following language above Plaintiff's signature:

I understand that any misrepresentation made by me herein may result in the cancellation of the employment application, withdrawal of any offer of employment or if already employed by Hercules [] termination of employment without any obligation or liability to me other than payment of the rate agreed upon for services actually rendered.

Hercules also submitted a copy of Plaintiff's Security Clearance form which read:

> I certify that I know that any misrepresentation or false statement made by me herein may subject me to prosecution under Title 18, United States Criminal Code, Section 911 and 1001 with penalties up to five (5) years imprisonment and $10,000 fine.

Plaintiff's signature appeared directly beneath this language. In addition, Hercules provided affidavits by two former Vice Presidents of Hercules wherein each asserted that Plaintiff

would have been terminated if Hercules had known of Plaintiff's misrepresentations. Finally, Hercules presented evidence that terminating Plaintiff for the misconduct with company policy.

In defense of Hercules' summary judgment motion, Plaintiff provided evidence of misconduct on the part of various employee which did not result in their termination. These incidents included unexcused absences, false statements concerning an employee's whereabouts while on duty, falsification of time cards, tardiness, and sleeping while on duty. Plaintiff also pointed to a statement in Hercules' Management Manual Procedure indicating that, unless otherwise stated, violations that occurred more than twelve months prior to a current violation should not be considered by the supervisor in determining the disciplinary action for the current violation.

The district court, relying on Summers v. State Farm Mutual Automobile Ins. Co., 864 F.2d 700 (10th Cir. 1988), granted Defendants' motion for summary judgment. The court determined that under Summers, Plaintiff's employment claims failed because even if she was unjustly terminated, she had no right to a remedy due to Hercules' unrefuted evidence that it would have terminated Plaintiff had it known of Plaintiff's misconduct.

On appeal, Plaintiff claims the district court erred n granting Hercules' motion for summary judgment with respect to her age discrimination, breach of contract, and wrongful termination claims because (1) Plaintiff's conduct was not serious and pervasive, (2) Plaintiff's misrepresentations on her employment application and pre-employment forms were not material, and (3) there remained a genuine issue of material fact regarding whether Hercules would have

terminated Plaintiff if it had known of her misconduct. Plaintiff does not dispute the district court's conclusion that Summers applies to claims for breach of contract and wrongful termination; rather, Plaintiff claims that the court erred in applying Summers to these facts. We review the district court's grant of summary judgment de novo, applying the same standard as the district court. Osgood v. State Farm Mut. Auto Ins. Co., 848 F.2d 141 (10th Cir. 1988).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 569c). In considering a summary judgment motion, we do not with the evidence; rather, we determine whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

249 (1986), see also Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Once the movant points to those portions of the record which demonstrate an absence of a genuine issue of material fact, the burden shifts to the nonmovant to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In Summers, the Plaintiff employee sued his employer, claiming he was terminated because of this religion and age. 864 F.2d at 701-02. Prior to being terminated, Summers had been placed on probation for falsifying several claims documents, and had been warned that he would be terminated if he engaged in further falsifications. Id. at 702. After several months, Summers was terminated for reasons unrelated to the claim falsifications.

Id. at 702-03. During preparation for trial, the employer discovered that Summers had falsified over 150 documents, including eighteen that were falsified after Summers' probation. Id. at 702. The employer moved for summary judgment, arguing that even if Summers could prove that he was terminated for discriminatory reasons, Summers should have no remedy because the employer had an independent basis for terminating him and would have terminated him had it known of the misconduct. Id. at 704. We agreed with the employer that the after-acquired evidence of Summers' misconduct could be considered stating:

[W]hile such after-acquired evidence cannot be said to have been a "cause" for Summers' discharge in 1982, it is relevant to Summers' claim of "injury," and does itself preclude the grant of any present relief to Summers.... The present case is akin to the hypothetical wherein a company doctor is fired because of his age,

race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.

Id. at 708. Accord Washington v. Lake County, 969 F.2d 250 97th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992). But see Wallace v. Dunn Constr. Co., 968 F. 2d 1174 (11th Cir. 1992) (rejecting Summers, there is no threshold requirement of serious and pervasive misconduct. Rather, for after-acquired evidence of employee misconduct to bar relief in a termination case, Summers merely requires proof that (1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the

misconduct. See also Johnson, 955 F.2d at 414. Furthermore, we disagree with Plaintiff's characterization of her conduct as "not meaningful" and "isolated." Plaintiff's multiple misrepresentations included a false statement on a Security Clearance form which contained a warning that such a statement was a federal felony, and a misrepresentation concerning the age of her youngest son, which allowed him to wrongfully obtain coverage under her health insurance plan.

Plaintiff also claims that summary judgment was inappropriate because her misrepresentations on her employment application and pre-employment forms were not material. In other words, Plaintiff argues that Hercules would not have been justified in terminating Plaintiff for these misrepresentations. In support of this argument, Plaintiff cites Johnson, 955 F.2d 409, in which the Sixth Circuit held that

summary judgment is not appropriate in a case of resume fraud unless the misrepresentation or omission was material --i.e., the employer would not have hired the employee if it had known the truth. Id. at 414. We need not address either resume fraud requires such a showing of materiality, however, because Plaintiff's resume misrepresentations were not the only misrepresentations Hercules relied upon in asserting that Plaintiff would have been fired. Plaintiff also lied, under penalty of law, on her Security Clearance form and on her application for health insurance. In light of the seriousness of theses misrepresentations, the sheer number of misrepresentations indicting Plaintiff's general disregards for the truth, the sensitivity of her position with Hercules as a Quality Control Inspector, and Hercules' reservation on an employment application, we conclude that Plaintiff's misconduct would have justified her termination.

Finally, Plaintiff claims that a genuine issue of material fact existed as to whether Hercules would have terminated Plaintiff if it had known of her misconduct. Hercules provided affidavit by company management personnel that plaintiff would have been terminated immediately if the company had discovered Plaintiff's misrepresentations. Hercules further supported this claim by relying on the language in Plaintiff's employment application that she may be terminated for any misrepresentations, as well as language in Hercules' procedure manual which demonstrated that termination based on Plaintiff's misconduct would have been consistent with company policy. Upon this showing, the burden shifted to Plaintiff to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324.

We conclude that Plaintiff failed to point to any evidence that created an issue of fact regarding whether Hercules would have fired Plaintiff had it known of her repeated misrepresentations. That portion of Plaintiff's evidence, which consisted of incidents involving other employees who were guilty of misconduct yet were not terminated, does not rebut Hercules' claim that Plaintiff would have been fired. Plaintiff has presented evidence that Hercules failed to terminate an employee for misconduct equivalent to her series of misrepresentations. Plaintiff's evidence of employee misconduct involving unexcused absences, tardiness, and sleeping while on duty are simply unrelated to Plaintiff's misconduct. Moreover, Plaintiff's evidence of misrepresentations by other employees involved relatively minor infractions such as false statements concerning an employee's whereabouts while on duty, not such serious

matters as false statements on an employment application, a Security Clearance form, or false statements leading to unwarranted health insurance coverage for a dependent.

Furthermore, Hercules' stated policy that violations occurring more than twelve moths prior to a current violation should not be considered in determining the disciplinary action for the current violation also does not help Plaintiff. This policy statement refers only to violations occurring more than twelve months earlier that were known to Hercules. Plaintiff presented no evidence that Hercules had a policy of forgiving unknown violations more than twelve months old. Plaintiff has therefore failed to make " a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

In summary, we conclude that, under Summers, Hercules' after-acquired evidence of Plaintiff's misconduct precludes Plaintiff from obtaining relief for her termination. This is so because Hercules successfully demonstrated that it did not know of Plaintiff's misconduct when she was terminated, it would have been justified in terminating Plaintiff of the misconduct, and it would, in fact, have terminated Plaintiff had it known of her misconduct.

AFFIRMED

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DOROTHEA O'DRISCOLL, an individual	
Plaintiff,	MEMORANDUM DECISION AND
-v-	ORDER
HERCULES, INC., a Delaware Corporation, JOHN F. BAKER and EDWARD D., McDONALD,	Civil No.C-89-297W
Defendants,	

This matter is before the court on cross-motion for partial summary judgment. A hearing was held on June 1, 1990, at which the plaintiff was represented by Kith E. Taylor, Spencer E. Austin and Douglas R. Davis. The court had carefully read the relevant documents submitted by the parties before the hearing, and at the conclusion of the hearing, the court took the motion under advisement. Having considered the matter further, the court now

renders the following memorandum decision and order.

BACKGROUND

Dorothea O'Driscoll was employed at Hercules' Bacchus Works in Magna, Utah from January 1980 to April 1986 at which time she was terminated. After her termination, O'Driscoll filed this action against Hercules alleging the violation of the Age Discrimination Employment Act ("ADEA'), Title VII of the Civil Rights Act of 1964, and the Fair Labor Standards Act. O'Driscoll also claims several violations of state law including breach of employment contract and wrongful discharge. Hercules maintains that O'Driscoll's termination was entirely unrelated to discrimination of any kind. Rather, the company claims that her termination was justified by O'Driscoll's serious misconduct. However, the present motions have nothing to

do with the reasons for O'Driscoll's termination.

During preparation for trial, Hercules discovered evidence of O'Driscoll's misconduct that was unknown to it when she was terminated. Hercules claims that O'Driscoll misrepresented, among other things, her age on a pre-employment examination, an employment application, and a United States government "Application and Authorization for Access to Confidential Information." O'Driscoll admits making these misrepresentations but claims she did not so only because she believed Hercules would discriminate against her if she revealed her true age. Hercules also alleges many other newly discovered misrepresentations by O'Driscoll during her employment at the company. In response to these additional allegations O'Driscoll claims either that she made further misrepresentations only to be consistent with her false age or that the

accusations by Hercules amount to nothing more than simple misunderstandings.

DISCUSSION

I. Standard of Review.

The standard for this court to rule on summary judgment motion is set forth in Federal Rule of Civil Procedure 56(c). Summary judgment shall be granted when parties to a lawsuit do not dispute any material facts and judgment in favor of moving party is appropriate as a matter of law. A moving party may demonstrate no material facts are disputed though "pleading, depositions, answers to interrogatories, admissions of file, and affidavits, if any, demonstrates... there is [no] evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has carried this burden rule 56(e) "requires the nonmoving party to go beyond the pleading and by ... affidavits or by

the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324. The non-moving party must make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

To be considered the evidence must be admissible under the evidential standard that would be applied at trial. Anderson v. Libert Lobby, Inc., 477 U.S. 242, 252 (1986). In considering a summary judgment motion, however, this court with the evidence but instead inquires either "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249. To determine if sufficient evidence exists "the inferences to be drawn from the underlying facts [in the admissible record]... must be viewed in the light most favorable to the

[nonmoving] party." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, 36 U.S. 654, 655 (1962). Finally, any admissible facts asserted by the party opposing the motion that are not controverted must be regarded as true.

II. The Motions for Summary Judgment:

The Defendants' motion for partial summary judgment does not seek a ruling that age discrimination played no part in its decision to terminate O'Driscoll. Rather, the defendant argues that under the principles set out in Summers v. State Farm Mutual Automobile Ins. Co., 864 F.2d 700 (10th Cir. 1988), the plaintiff has no remedy under the ADEA and Title VII. Hercules claims that if it had known the extent and nature of O'Driscoll's misconduct during her employment, it would have terminated her immediately. Hercules argues that under Summers the plaintiff has no

remedy even if she could demonstrate age discrimination because the defendant has an independent basis for which the plaintiff would have been terminated. This is true, according to the defendant, even if the independent basis was unknown when O'Driscoll's termination took place.

Hercules further argues that although this rational has not been applied under Utah law, this court should apply Summers to preclude the plaintiff's remedy for her breach of employment contract, wrongful discharge and Utah Anti-discrimination Act ("UADA") claims as well. Alternatively, the defendant argues that the breach of contract and wrongful discharge claims should be barred because the UADA provides the exclusive remedy for state discrimination claims and that the UADA claims should be barred because the plaintiff failed to exhaust her administrative remedies.

The plaintiff's motion for partial summary judgment resembles a motion in limine. The plaintiff asks this court to rule that as a threshold matter the Summers rational does not apply to this case because O'Driscoll's "misconduct" was not "serious and pervasive" as was the plaintiff's conduct in Summers. On this basis the plaintiff argues that Summers is wholly inapplicable and neither state nor federal remedies should be precluded on this basis. the plaintiff further argues that she has exhausted her administrative remedies and that her breach of contract and wrongful discharge claims do not fall under the UADA because Hercules breached its employment contract with O'Driscoll in ways unrelated to discrimination.

This court believes that the principles set out in Summers should be applied in the present case. In Summers the plaintiff employee was suspended without pay for two

weeks for falsifying insurance documents. Upon returning, the plaintiff was warned that further problems of this type would result in termination. After several months the plaintiff was terminated for unrelated reasons according to the defendant. The plaintiff brought suit alleging age discrimination. During preparation for trial, the defendant discovered 150 new cases in which the plaintiff had falsified documents. Eighteen of these occurred after the plaintiff returned from suspension. The defendant moved for summary judgment arguing that even if discriminatory termination could be shown, the plaintiff should have no remedy since the defendant had an independent basis for terminating the plaintiff.

The Tenth Circuit affirmed the district court's summary judgment ruling in favor of the defendant stating:

To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor". In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position. (Footnote omitted) Id. at 708. The court did not address the reasons for the plaintiff's termination since the plaintiff "would be entitled to no relief" even if discriminatory termination were assumed: [W]hile such after-acquired evidence cannot be said to have been a "cause" for Summers' discharge in 1982, it is relevant to Summers' claim of "injury," and does itself preclude the grant of any present relief or remedy to Summers." Id.

O'Driscoll's contention that an employee's misconduct must, as a threshold matter, be "serious and pervasive" before Summers applies is without merit. The "serious and pervavive" nature of an employees miscondcuts, however, is not excluded from the Summers analysis entirely. An employer must show that misconduct was such that an employee's misconduct , however, is not excluded from the Summers analysis entirely. An employer must show that misconduct was such that an employee would have been terminated had the employer known of the misconduct before or at the time of termination. This requirement prevents an employer from combing an employee's file after a discriminatory termination to discovery minor, trivial or technical infractions for use in a Summers defense. On this motion for summary judgment Hercules must show that as a matter of law O'Driscoll would have been terminated had the

company known of her misconduct. While there was no serious question in Summers that the employee would have been terminated if the employer had known of the employee's misconduct, the question is a closer one in the present case.

Although many of the misrepresentations alleged by Hercules have been characterized as "misunderstanding" by O'Driscoll, she admits to falsifying her age on several occasion, the ages of her children, the year of her high school graduation, and the fact that she had never previously applied for work at Hercules. Hercules has submitted affidavits by company management personnel to the effect that O'Driscoll would have been terminated immediately if the company had known of the misrepresentation to which O'Driscoll has admitted. Plaintiff argues that these affidavits are "self serving" and should not be accepted as conclusive by the court. However, not only

is this testimony unrebutted but is simply strains credulity to accept that any reasonable management personnel would have done otherwise had they known of her misrepresentations. O'Driscoll attempts in two ways to show that the company would not have terminated her.

First, O'Driscoll claims that Hercules has a company policy that requires that misconduct older than twelve months must be ignored when considering termination. Since the misstatements O'Driscoll admits making are older than twelve months, she argues the company would not have used these incidents as the basis for termination. On careful examination, it is clear that the plaintiff misunderstands the company policy to which she appeals.

The policy is not a twelve month limitation period such that an employee cannot be made to answer for misconduct which is

undiscovered for twelve months. Rather, according to information in the record and statement quoted by the plaintiff's counsel in oral argument, it is apparent that Hercules has a policy against using it as a basis for termination, misconduct which it has known about for over twelve months. When the company has known about misconduct for twelve months and not taken any disciplinary action, it regards the misconduct as "ancient history."

In this way, it would be consistent with company policy to decline to terminate and employee for misconduct which occurred two years previously if the misconduct were discovered eighteen months earlier. The policy simply requires the company to either take action within twelve months of learning of misconduct or disregard the misconduct in future termination decisions. On the other hand, it would also be consistent with company

policy to terminate an employee for misconduct which occurred ten years earlier if the company only recently learned of the misconduct. Since the situation in this case resembles the latter scenario, the company policy identified by the plaintiff would not protect her from termination.

Second, the plaintiff identifies several situations in which Hercules has failed to terminate employees despite known misconduct. However, the plaintiff's examples involve relatively minor infractions such as the improper use of sick leave and unauthorized absences. The plaintiff has identified no situation in which Hercules has failed to terminate an employee for behavior as serious as misrepresenting information on employment applications and on a request for a federal government security clearance. A factual question may exist if the present case involved abuse of Hercules' sick leave policy or similar

behavior, but the plaintiff has offered no convincing reason to doubt Hercules' insistence that the company would have promptly terminated her. This court believes that there is no material question that Hercules would have terminated O'Driscoll under these circumstances.

Hercules has also moved for summary judgment on the plaintiff's claim based on the UADA and the claims for wrongful termination and breach of an employment contract. The defendant concedes that the principles in Summers have not been adopted by Utah courts as part of Utah law. "Where no state court has addressed clearly the substantive law of the state upon which summary judgment is granted, federal courts must predict how the state's highest court would rule." Weiss v. United States, 787 F.2d 518, 525 (10th Cir. 1988).

Our research has revealed no indication that the Utah State Supreme Court would

either adopt or reject the principles in Summers. Decisions from other jurisdictions are similarly unhelpful. Summers has been applied by a Kansas federal district court, Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989, and by the Seventh Circuit, Powers v. Chicago Transit Auth., 890 F.2d 1355 (7th Cir. 1989). Compare Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 (7th Cir. 1989). Because of the soundness of the Summers approach and the absence of contrary indications, this court is of the opinion that the Utah State Supreme Court would apply Summers in the present case.

The Summers rational applies to the plaintiff's claim under the UADA in precisely the same way as it applies to the ADEA and Title VII claims. Summers also provides a defense against the breach of contract and wrongful termination claims. Even if the plaintiff show that Hercules breached its

employment contract and terminated her wrongfully, this court believes she has no right to a remedy. It would distort the purpose of these causes of action to allow a plaintiff to recover from an employer against whom the plaintiff had committed misconduct such that, had the employer known of the misconduct, the employer would certainly have terminated the plaintiff.

Accordingly, summary judgment is granted in favor of the defendants on the plaintiff's first, third and fifth claims against Hercules in the second amended complaint. The defendants are directed to prepare an appropriate judgment in accordance with this decision.

***

KEITH E. TAYLOR (3201)
SPENCER E. AUSTIN (0150)
DOUGLAS R. DAVIS (5062)
of and for
PARSONS, BEHLE, & LATIMER
Attorneys for Defendants
185 South State Street Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DOROTHEA O'DRISCOLL, an individual,	
Plaintiff,	
vs.	JUDGMENT ON FIRST , THIRD AND FIFTH CLAIMS OF PLAINTIFF'S SECOND AMENDED COMPLAINT
HERCULES, INC., a Delaware corporation corporation, JOHN F. BAKER, EDWARD D. McDONALD,	
Defendants.	Case No. 89C-297W

Defendant's Motion for Partial Summary Judgment came on for hearing before the Court on June 1, 1990. Plaintiff was represented by

Randall S. Feil and defendants were represented by Keith E. Taylor, Spencer E. Austin and Douglas R. Davis. After having considered oral argument the memoranda filed by the parties and all other pleadings and papers on file herein, the Court on July 2, 1990 entered its "Memorandum Decision and Order" granting defendants' Motion for Partial Summary Judgment.

Based upon the foregoing, it is HEREBY ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of defendants and against plaintiff on plaintiff's First, Third and Fifth Claims against defendant Hercules Incorporated in the Second Amended Complaint on file herein and the same are hereby dismissed with prejudice.

Entered this 27 day of July, 1990.

BY THE COURT:

___/s/_____

Honorable David K. Winder

United States District Court Judge

KEITH E. TAYLOR (3201)
SPENCER E. AUSTIN (0150)
DOUGLAS R. DAVIS (5062)
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Defendants
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DOROTHEA O'DRISCOLL, an individual, Plaintiff, vs. HERCULES, INC., a Delaware corporation, JOHN F. BAKER and EDWARD D. McDONALD, Defendant.	JUDGMENT Case No. 89C-297W

On June 30, 1990, the Court issued a Memorandum Decision and Order granting defendants' first Motion for Summary Judgment

on plaintiff's First, Third and Fifth Claims. On July 27, 1990, the Court entered judgment in accordance with its Memorandum Decision and Order, dismissing with prejudice plaintiff's First, Third and Fifth Claims in the Second amended Complaint. On May 29, 1990, defendants filed a Second Motion for Summary Judgment, requesting the court to summarily dismiss plaintiff's remaining claims with prejudice. The plaintiff and the defendants submitted memoranda, affidavits and other documents in support of their respective positions. Neither side requested oral argument. After having carefully reviewed the entire record in this matter, the Court on October 25, 1990, issued a Memorandum Decision and Order granting defendants' Second Motion for Summary Judgment and dismissing with prejudice plaintiff's claims for violation of the Equal Pay Act, defamation, infliction of emotional distress, and

interference with contractual and economic relations.

Based upon the foregoing, it is HEREBY ORDERED, ADJUDGED AND DECREED:

1. That judgment is hereby entered in favor of defendants and against plaintiff on all of plaintiff's claims against defendants in the Second Amended Complaint on file herein, and that the same and Plaintiff's enter action against all defendants are hereby dismissed with prejudice.

2. That defendants have and recover from plaintiff their costs herein, upon proper application by defendants.

Dated this 13 day of November, 1990.

BY THE COURT:

___/s/_____
Honorable David K. Winder
United States District Court Judge

***

KEITH E. TAYLOR (3201)
SPENCER E. AUSTIN (0150)
DOUGLAS R. DAVIS (5062)
of and for
PARSONS, BEHLE, & LATIMER
Attorneys for Defendants
185 South State Street Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DOROTHEA O'DRISCOLL, an individual,	
Plaintiff,	ORDER CERTIFYING
vs.	JUDGMENT ENTERED JULY
HERCULES, INC., a DELAWARE corporation	7, 1990 AND JUDGMENT ENTERED NOVEMBER 13, 1990 FINAL UNDER FED. R.
HERCULES, INC., a Delaware corporation, JOHN F. BAKER and EDWARD D. McDONALD,	CIV. P. 54 (b)
	Case No. 89C-297W
Defendant.	

Based on defendants' Motion for Order Certifying Judgment Entered July 27, 1990 and Judgment Entered November 13, 1990 Final Under Fed. R. Civ. P. 54(b), and good cause therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Judgment entered July 27, 1990 and the Judgment entered November 13, 1990 are hereby certified as final under Fed. R. C. P. 54(b)

2. That there is no just reason for delaying appeal of the Judgment entered July 27, 1990, and the Judgment entered November 13, 1990.

Dated this 27 day of August, 1992.

BY THE COURT:

___/s/_____
David K. Winder
United States District Court Judge

Supreme Court, U.S.
FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1728

In The

Supreme Court of the United States

October Term, 1993

DOROTHEA O'DRISCOLL,

Petitioner,

v.

HERCULES, INC., a Delaware corporation, JOHN F. BAKER, EDWARD D. McDONALD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

KEITH E. TAYLOR
Counsel of Record

SPENCER E. AUSTIN
DOUGLAS R. DAVIS
ELISABETH R. BLATTNER
PARSONS BEHLE & LATIMER
Attorneys for Respondents

201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Does an employee forfeit all remedies under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 when evidence obtained by her employer for the first time after her discharge shows that she engaged in a pattern of dishonesty constituting felonies under state or federal law which continued to the date of her discharge and for which she would have been discharged had the facts been known by her employer?

PARTIES INVOLVED

All of the parties involved in this action are listed in the caption. Respondent Hercules, Inc., a corporation, has no parent company, but partially owns the following twenty-three subsidiary companies: Tastemaker Pty. Ltd. (Australia); Polo Industria e Comercio Ltda. (Brazil); Tastemaker, Inc. (Canada); Algas Marinas S.A. (Chile); Tastemaker Holdings Limited (England); Abieta Chemie GmbH (Germany); P.T. Hercules Mas Indonesia (Indonesia); Rika-Hercules Incorporated (Japan); Sumika-Hercules Company, Ltd. (Japan); Tastemaker K.K. (Japan), Teijin-Hercules Ltd. (Japan); Hercules Korea Chemical Co. Ltd. (Korea); Taloquimia, S.A. (Mexico); Tastemaker S.A. (Mexico), Tastemaker B.V. (The Netherlands); Tastemaker Ltd. (New Zealand); Pakistan Gum Industries Limited (Pakistan); Tastemaker Pte. Ltd. (Singapore); Taiwan Hercules Chemicals Inc. (Taiwan); BHC Laboratories, Inc. (U.S.A.); Hercules-Sanyo, Inc. (U.S.A.); HISPAN Corp. (U.S.A.); Tastemaker (USA).

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No. 93-1728

In The

Supreme Court of the United States

October Term, 1993

DOROTHEA O'DRISCOLL,

Petitioner,

v.

HERCULES, INC., a Delaware corporation, JOHN F. BAKER, EDWARD D. McDONALD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

Respondents, by and through their attorneys of record, hereby submit their brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah granting summary judgment to Hercules is reported at *O'Driscoll v. Hercules, Inc., et al,* 745

F. Supp. 656 (D. Utah 1990) (hereinafter "Trial Court Decision").

The opinion of the Tenth Circuit Court of Appeals affirming summary judgment for Hercules is reported at *O'Driscoll v. Hercules, Inc., et al,* 12 F.3d 176 (10th Cir., January 5, 1994) (hereinafter "Appeals Court Decision"), *petition for cert. filed* (April 1, 1994). Respondents have reproduced the Appeals Court Decision in their appendix because petitioner's version omits language critical to the Supreme Court's disposition of this writ.

JURISDICTION

The judgment that petitioner seeks to review was entered by the Tenth Circuit Court of Appeals on January 5, 1994. The Supreme Court, however, does not have jurisdiction over the resume fraud issue raised by petitioner because the Tenth Circuit Court of Appeals expressly did not pass upon that issue. *See* "Reasons for Denying the Petition," *infra* at 9-14. Therefore, although petitioner has timely filed her petition seeking reversal of the Tenth Circuit Court of Appeals' decision which granted summary judgment against petitioner on two federal claims, the Supreme Court should not properly grant a writ of certiorari in this matter. Jurisdiction is thus lacking under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in the instant action are set forth below:

1. 18 U.S.C. § 1001 (1976).

"§ 1001. *Statements or entries generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. 28 U.S.C. § 1254(1) (1988).

"§ 1254. *Courts of appeals; certiorari; certified questions.*

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil action or criminal case, before or after rendition of judgment or decree . . . . "

3. 29 U.S.C. § 623(a)(1) (1985).

"§ 623. *Prohibition of age discrimination.*

(a) *Employer practices.*

It shall be unlawful for an employer –

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . . "

4. 42 U.S.C. § 2000e-2(a) (1981).

"§ 2000e-2. *Unlawful employment practices.*

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . . "

5. Utah Code Ann. § 76-6-405(1) (1990).

"76-6-405. *Theft by deception.*

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof."

6. Utah Code Ann. § 76-6-412(1)(a)(i) (1990).

"76-6-412. *Theft – Classification of offenses – Action for treble damages against receiver of stolen property.*

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services exceeds $1,000; . . . . "

STATEMENT OF THE CASE

1. Petitioner is a former Hercules employee who was employed as a Quality Control Inspector for Hercules' Bacchus Works in Magna, Utah ("Hercules") from January 7, 1980 to April 25, 1986, when she was involuntarily terminated. R. App. at 2.

2. Upon termination, petitioner sued respondents alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, and violations of state law. R. App. at 2.

3. After petitioner was terminated, respondents discovered evidence that she had engaged in a pervasive pattern of dishonesty beginning at the time she applied for employment and continuing to the date of her discharge. R. App. at 2-3, 7.

4. The uncontroverted evidence of misconduct included various acts of dishonesty, three of which constituted felonies under state or federal law. The misconduct is set out below.

5. On her employment application, despite being notified in writing that any misrepresentation on the application could result in cancellation of her application, withdrawal of any offer of employment to her, or termination of her employment, petitioner lied about her age, lied about the fact that she had previously applied for employment with Hercules, and lied about her previous employer. R. App. at 2, 3.

6. On a pre-employment form, despite certifying in writing that she was providing true and correct information, petitioner lied about her age. R. App. at 2; Aplee. Supp. App. at 3, 83.

7. On a separate pre-employment personal history form, petitioner lied about her date of graduation from high school, lied about the ages of her children, lied about her job experience, and claimed she had completed two quarters of college when in fact she had not. R. App. at 2; Aplee. Supp. App. at 9-11, 52-53, 87-90.

8. During the course of her employment, petitioner repeatedly lied on various "Intra-Plant" job applications at Hercules about her educational background. Once in 1983, once in 1984, and four times in 1985, petitioner asserted in such applications that she had "1½ years of college," when in fact she had completed no college courses. Aplee. Supp. App. at 29-44, 150-55.

9. In connection with her employment, petitioner applied for medical insurance membership with Blue Cross-Blue Shield of Utah. On her membership application, petitioner lied about her son's age, thus obtaining insurance coverage for him when he otherwise would not have been covered. R. App. at 2-3. Petitioner's lie resulted in premium payments by Hercules in the amount of $2,249.82, and payment of at least one unauthorized claim by Blue Cross-Blue Shield. R. App. at 7, n.2; Aplee. Supp. App. at 17-18. Under Utah Code Ann. §§ 76-6-405(1) and 76-6-412(1)(a), petitioner's actions constituted criminal theft, a state felony in the second degree.

10. In connection with her employment, petitioner applied for a security clearance with the United States

Department of Defense. On her application, plaintiff lied about her age, despite certifying in writing that the information was true and that she knew that any misrepresentation or false statement could subject her to criminal prosecution with penalties of up to five (5) years imprisonment and a $10,000 fine. R. App. at 2-3. Under 18 U.S.C. § 1001, petitioner's action constituted a federal felony.

11. At the time of her discharge, petitioner collected from Hercules a lump-sum in settlement of her retirement benefits in the amount of approximately $2,857.93, which sum was calculated upon her falsified age, and which sum she would not have been entitled to had her age correctly been reported. Aplee. Supp. App. at 138-39. Petitioner did not inform Hercules that she was not in fact the age she claimed to be. *See id.* Under Utah Code Ann. §§ 76-6-405(1) and 76-6-412(1)(a), petitioner's action constituted criminal theft, a state felony in the second degree.

12. Firing petitioner for these acts of misconduct would have been consistent with Hercules policy, and respondents would in fact have fired petitioner had they learned of her misconduct. R. App. at 3-4.

13. In the trial court, respondents moved for summary judgment on all of petitioner's claims on the grounds that this after-acquired evidence of misconduct barred petitioner's claim under the doctrine in *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and the District Court granted respondents' motion relying on *Summers*. Pet. App. at 23, 25, 35.

14. On appeal, petitioner asserted that summary judgment should be reversed because (1) her conduct was not serious and pervasive, (2) her resume fraud was insufficiently material to bar her claim, and (3) there was a dispute of fact over whether Hercules would have fired her had it known of her misconduct. R. App. at 4-5.

15. The Court of Appeals rejected the first and last of petitioner's arguments and expressly refused to consider the resume fraud issue. R. App. at 7, 9, 8.

16. With regard to the resume fraud issue, the Tenth Circuit Court of Appeals stated:

> We need not address whether resume fraud requires such a showing of materiality, however, because Plaintiff's resume misrepresentations were not the only misrepresentations Hercules relied upon in asserting that Plaintiff would have been fired. Plaintiff also lied, under penalty of law, on her Security Clearance form and on her application for health insurance. In light of the seriousness of these misrepresentations, the sheer number of misrepresentations indicating Plaintiff's general disregard for the truth, the sensitivity of her position with Hercules as a Quality Control Inspector, and Hercules' reservation of the right to discharge any employee making a misrepresentation on an employment application, we conclude that Plaintiff's misconduct would have justified her termination.

R. App. at 8.

17. The Court of Appeals also stated with regard to the resume fraud issue:

> In light of our holding, we do not address Hercules' alternative argument that it would not

> have hired Plaintiff had it known of her employment application misrepresentations.

R. App. at 10, n.3.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT PRESENTED WITH ACCURACY AND CLARITY THE TENTH CIRCUIT COURT OF APPEALS' DECISION, WHICH IS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

Petitioner has not clearly and accurately presented the decision of the Tenth Circuit Court of Appeals to the Supreme Court. Petitioner's reproduction of the Appeals Court Decision contains numerous errors, and most importantly, omits some of the Tenth Circuit Court's critical language establishing the fact that this Court does not have jurisdiction over the issue presented in her petition. *Compare, e.g.*: Pet. App. at 8 *with* R. App. at 5, n.1; Pet. App. at 11 *with* R. App. at 7; Pet. App. at 12 *with* R. App. at 7 n.2; Pet. App. at 17 *with* R. App. 10, n.3. Accordingly, under Rule 14.5 of the Supreme Court Rules, the petition for a writ of certiorari should be denied.

II. THE ISSUE RAISED IN THE PETITION, RESUME FRAUD, WAS NOT AN ISSUE PASSED UPON BY THE COURT OF APPEALS AND IS THUS NOT AN ISSUE OVER WHICH THIS COURT HAS JURISDICTION.

Petitioner has asked this Court to consider whether after-acquired evidence of "serious misconduct *in initially obtaining employment*" is a sufficient basis upon which a plaintiff may be denied a remedy for termination of her employment in violation of Title VII and ADEA. In other words, petitioner is asking this Court to visit the issue of the effect of resume fraud as a bar to her federal claims. This issue, however, is not one over which this Court has jurisdiction, because this issue was never passed upon by the Tenth Circuit Court of Appeals in this case.

The Supreme Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *See United States v. Williams*, 112 S. Ct. 1735, 1738 (1992) (relying on *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987) (O'Connor, J., dissenting). According to the Court, "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed *so long as it has been passed upon . . . .* " *Id.* at 1738-39 (emphasis added). When the Court of Appeals in the case below has not decided the substantive issue presented, however, the Supreme Court may not address the question for the first time. *Accord id.* (quoting *Stevens v. Department of Treasury*, 111 S. Ct. 1562 (1991) for the reverse proposition, that is, if the appeals court has decided the substantive issue, the Supreme Court may review it).

In the case at bar, the substantive issue – whether resume fraud can preclude petitioner's claim – was not decided by the Tenth Circuit Court of Appeals. The Appeals Court *expressly* determined that it *did not have to reach* the issue of the materiality of the resume fraud, *nor did it have to address* the issue of whether Hercules would not have hired petitioner had it known of the lies she made in initially obtaining employment. *See* Statement of the Case ¶¶ 15-17, *supra*.[1]

Instead, the Appeals Court could and did rely on petitioner's post-resume misconduct in affirming summary judgment for Hercules, most importantly, on petitioner's lies leading to the wrongful obtainment of insurance coverage for her son – a state felony – and her lies on a Security Clearance form – a federal felony. *See* Appeals Court Decision at 8 (R. App. at 8). These acts, combined with the sheer number of other misrepresentations, the sensitivity of petitioner's job position, and Hercules' reservation of the right to discharge an employee for lying on an employment application, convinced the Court of Appeals that plaintiff's misconduct justified her termination. *Id.* Because it was undisputed that Hercules did not know of petitioner's misconduct when it fired her and would have fired her had it known, the Tenth Circuit Court of Appeals, applying the after-acquired evidence rule of *Summers*, affirmed the Trial Court's decision. *Id.* at 10 (R. App. at 10).

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[1] The Court of Appeals also expressly refused to decide whether after-acquired evidence of misconduct could operate as less than a total bar to petitioner's claim. *See* Appeals Court Decision at 5, n.1 (R. App. at 5, n.1).

Petitioner misrepresents to the Supreme Court that it has jurisdiction over the issue presented when that is clearly not the case. The Tenth Circuit Court of Appeals did not pass on the substance of the resume fraud issue that petitioner seeks to have this Court review. Accordingly, under the traditional rule regarding Supreme Court jurisdiction, certiorari should be denied.

III. THERE IS NO SPLIT IN THE CIRCUITS ON THE AFTER-ACQUIRED EVIDENCE ISSUE PRESENTED BY THIS APPEAL.

There is no split in the circuits on the issue presented by this appeal. Only two circuit courts have ruled upon the extent to which after-acquired evidence of misconduct that occurred during the employment relationship operates as a bar to a discharged employee's claim for violation of federal employment discrimination laws. The Tenth Circuit Court of Appeals did so in this case and in *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700, 704-09 (10th Cir. 1989), and the Sixth Circuit Court of Appeals did so in *McKennon v. Nashville Banner Pub. Co.*, 9 F.3d 539 (6th Cir. 1993), *petition for cert. filed* (March 30, 1994).[2]

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[2] All other circuit court opinions that respondents have located which address the effect of after-acquired evidence on a federal discriminatory discharge claim concern resume fraud, not misconduct during the employment relationship. *See Dotson v. United States Postal Service*, 977 F.2d 976 (6th Cir. 1992) (lies on employment application and in job interview), *cert. denied*, 113 S. Ct. 263 (1992); *Milligan-Jensen v. Michigan Tech. Univ.*, 975 F.2d 302 (6th Cir. 1992) (lies on employment application), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989) (lies on

These two circuit courts are in complete agreement – the after-acquired evidence of plaintiff's on-the-job misconduct is relevant to the injury she suffered and applies to totally bar her claim.[3] Two circuits in agreement do not create a split. Granting certiorari in this matter would therefore be premature.

IV. EVEN IF THIS COURT HAD JURISDICTION TO REVIEW WHETHER RESUME FRAUD BARS AN EMPLOYEE'S ADEA AND TITLE VII CLAIMS, THIS CASE IS A POOR VEHICLE FOR SETTLING THE AFTER-ACQUIRED EVIDENCE RULE ANNOUNCED IN SUMMERS.

The facts at bar do not make a compelling case for determining whether after-acquired evidence should bar

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resume); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) (lies on employment application); *Kristufek v. Hussmann Foodservice Co., Toastmaster Div.*, 985 F.2d 364 (7th Cir. 1993) (lies in job interview); *Welch v. Liberty Machine Works, Inc.*, - F.3d -, 1994 WL 169682 (8th Cir. May 6, 1994) (lies on resume and employment application); *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) (lies on resume and employment application). As discussed in the text above, *supra* at 10-12, the resume fraud issue is not properly before this Court.

[3] There is no suggestion in *Summers* that the plaintiff made any argument that after-acquired evidence should operate other than as a total bar to his claim. In this case, petitioner O'Driscoll asserted for the first time at oral argument before the three judge panel of the Tenth Circuit Court of Appeals that heard her appeal, that any bar against her claim should be a partial rather than a total bar. The panel expressly refused to decide the issue, saying it had no authority to overrule *Summers*. *See* Appeals Court Decision, n.1 (R. App. at n.1). Petitioner had every opportunity to pursue an *en banc* rehearing of the issue but failed to do so.

an employee's claim of discriminatory discharge. Here, petitioner's misconduct was extremely egregious. She did not just engage in one or two misstatements in her employment application. Rather, outside of her resume fraud, from the day petitioner was employed until the day she was fired, she engaged in a pervasive pattern of knowingly and willfully made self-serving lies, including three lies so serious that they amounted to state or federal felonies. *See* Statement of the Case, ¶¶ 5-11.

In this context, petitioner's policy argument that the after-acquired evidence doctrine in *Summers* makes her worse off than if she had never sued simply smells bad. Petitioner is like an employee who murders her boss and then claims entitlement to compensation during the pendency of the investigation. Her unclean hands completely shut down any stirrings one otherwise might have felt about the public good to be served in requiring the employer to bear the cost of defending against her claims of discrimination. Surely there will be a more savory case than this one in which to face the issue of the implications of after-acquired evidence of fraudulent conduct during employment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court to deny the petition for writ of certiorari.

Respectfully submitted,

KEITH E. TAYLOR
COUNSEL OF RECORD

SPENCER E. AUSTIN
DOUGLAS R. DAVIS
ELISABETH R. BLATTNER
PARSONS BEHLE & LATIMER

Attorneys for Respondents

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DOROTHEA O'DRISCOLL, Plaintiff-Counter-Defendant-Appellant, vs. HERCULES INC., a Delaware corporation; JOHN F. BAKER; EDWARD D. McDONALD, Defendants-Counter-Claimants-Appellees.	)	No. 92-4164

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 89-CV-297W)

(Filed Jan. 5, 1994)

Phillip B. Shell of Day & Barney, Murray, Utah, for Plaintiff-Counter-Defendant-Appellant.

Keith E. Taylor (Spencer C. Austin, Douglas R. Davis with him on the brief), of Parsons, Behle & Latimer, Salt Lake City, Utah, for Defendants-Counter-Claimants-Appellees.

Before BALDOCK, BARRETT, and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Dorothea O'Driscoll appeals the district court's grant of summary judgment in favor of Defendants. The district court certified the judgment in this multiple-claim litigation under Fed. R. Civ. P. 54(b), and we exercise jurisdiction pursuant to 28 U.S.C. § 1291.

Plaintiff was employed as a Quality Control Inspector for Hercules, Inc. Bacchus Works in Magna, Utah ("Hercules") from January 7, 1980 until she was terminated on April 25, 1986. Upon termination, Plaintiff filed suit against Hercules and others alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as well as violations of state law including breach of employment contract and wrongful termination.

While preparing for trial, Hercules discovered evidence of misconduct on the part of Plaintiff that it was unaware of when it terminated Plaintiff. The uncontroverted after-acquired evidence of misconduct included the following: (1) on her employment application, Plaintiff misrepresented her age so as to appear five years younger, falsely represented that she had never previously applied for employment with Hercules, and failed to disclose a previous employer; (2) on her pre-employment forms, Plaintiff misrepresented her age, date of graduation from high school, ages of her children, and falsely represented that she had completed two quarters of study at Salt Lake City Technical College; (3) on her application for membership with Blue Cross-Blue Shield of Utah, Plaintiff misrepresented the age of her son, who would have been otherwise ineligible for coverage as

Plaintiff's dependant; and (4) on her "Application and Authorization for Access to Confidential Information" ("Security Clearance"), a United States Government form, Plaintiff misrepresented her age.

In support of its motion for summary judgment, Hercules provided evidence of the foregoing misrepresentations made by Plaintiff as well as a copy of Plaintiff's employment application which contained the following language above Plaintiff's signature:

> I understand that any misrepresentation made by me herein may result in the cancellation of this employment application, withdrawal of any offer of employment or if already employed by Hercules [ ] termination of employment without any obligation or liability to me other than payment of the rate agreed upon for services actually rendered.

Hercules also submitted a copy of Plaintiff's Security Clearance form which read:

> I certify that I know that any misrepresentation or false statement made by me herein may subject me to prosecution under Title 18, United States Criminal Code, Sections 911 and 1001 with penalties up to five (5) years imprisonment and $10,000 fine.

Plaintiff's signature appeared directly beneath this language. In addition, Hercules provided affidavits by two former Vice Presidents of Hercules wherein each asserted that Plaintiff would have been terminated if Hercules had known of Plaintiff's misrepresentations. Finally, Hercules

presented evidence that terminating Plaintiff for the misconduct would have been consistent with company policy.

In defense of Hercules' summary judgment motion, Plaintiff provided evidence of misconduct on the part of various employees which did not result in their termination. These incidents included unexcused absences, false statements concerning an employee's whereabouts while on duty, falsification of time cards, tardiness, and sleeping while on duty. Plaintiff also pointed to a statement in Hercules' Management Manual Procedure indicating that, unless otherwise stated, violations that occurred more than twelve months prior to a current violation should not be considered by the supervisor in determining the disciplinary action for the current violation.

The district court, relying on *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), granted Defendants' motion for summary judgment. The court determined that under *Summers*, Plaintiff's employment claims failed because even if she was unjustly terminated, she had no right to a remedy due to Hercules' unrefuted evidence that it would have terminated Plaintiff had it known of Plaintiff's misconduct.

On appeal, Plaintiff claims the district court erred in granting Hercules' motion for summary judgment with respect to her age discrimination, breach of contract, and wrongful termination claims because (1) Plaintiff's conduct was not serious and pervasive, (2) Plaintiff's misrepresentations on her employment application and preemployment forms were not material, and (3) there remained a genuine issue of material fact regarding

whether Hercules would have terminated Plaintiff if it had known of her misconduct.[1] Plaintiff does not dispute the district court's conclusion that *Summers* applies to claims for breach of contract and wrongful termination; rather, Plaintiff claims that the court erred in applying *Summers* to these facts. We review the district court's grant of summary judgment de novo, applying the same standard as the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a summary judgment motion, we do not weigh the evidence; rather, we determine whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), *see also Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the movant points to those portions of the record which demonstrate an absence of a genuine issue of material fact, the burden shifts to the nonmovant to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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[1] At oral argument, Plaintiff also asserted that we should modify *Summers* so that it did not operate to completely bar recovery in an employment discrimination suit. However, even if we agreed with Plaintiff's position, a three-judge panel cannot disregard or overrule circuit precedent. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990).

In *Summers*, the plaintiff employee sued his employer, claiming he was terminated because of his religion and age. 864 F.2d at 701-02. Prior to being terminated, Summers had been placed on probation for falsifying several claims documents, and had been warned that he would be terminated if he engaged in further falsifications. *Id.* at 702. After several months, Summers was terminated for reasons unrelated to the claim falsifications. *Id.* at 702-03. During preparation for trial, the employer discovered that Summers had falsified over 150 documents, including eighteen that were falsified after Summers' probation. *Id.* at 702. The employer moved for summary judgment, arguing that even if Summers could prove that he was terminated for discriminatory reasons, Summers should have no remedy because the employer had an independent basis for terminating him and would have terminated him had it known of the misconduct. *Id.* at 704. We agreed with the employer that the after-acquired evidence of Summers' misconduct could be considered stating:

> [W]hile such after-acquired evidence cannot be said to have been a "cause" for Summers' discharge in 1982, it is relevant to Summers' claim of "injury," and does itself preclude the grant of any present relief to Summers. . . . The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.

Id. at 708. *Accord Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992). *But see Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992) (rejecting *Summers* approach).

Plaintiff first claims that the district court erred in applying *Summers* because Plaintiff's conduct was not "serious and pervasive." We reject this claim because under *Summers*, there is no threshold requirement of serious and pervasive misconduct. Rather, for after-acquired evidence of employee misconduct to bar relief in a termination case, *Summers* merely requires proof that (1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct. *See Summers*, 864 F.2d at 708; *see also Johnson*, 955 F.2d at 414. Furthermore, we disagree with Plaintiff's characterization of her conduct as "not meaningful" and "isolated." Plaintiff's multiple misrepresentations included a false statement on a Security Clearance form which contained a warning that such a statement was a federal felony, and a misrepresentation concerning the age of her youngest son, which allowed him to wrongfully obtain coverage under her health insurance plan.[2] Thus, Plaintiff's repeated misrepresentations demonstrated a pattern of dishonesty and disregard for the truth.

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[2] As a result of Plaintiff's misrepresentations concerning her son's age, Hercules paid $2,249.82 in extra insurance premiums over and above what it would have been required to pay for individual coverage.

Plaintiff also claims that summary judgment was inappropriate because her misrepresentations on her employment application and pre-employment forms were not material. In other words, Plaintiff argues that Hercules would not have been justified in terminating Plaintiff for these misrepresentations. In support of this argument, Plaintiff cites Johnson, 955 F.2d 409, in which the Sixth Circuit held that summary judgment is not appropriate in a case of resume fraud unless the misrepresentation or omission was material – *i.e.*, the employer would not have hired the employee if it had known the truth. *Id.* at 414. We need not address whether resume fraud requires such a showing of materiality, however, because Plaintiff's resume misrepresentations were not the only misrepresentations Hercules relied upon in asserting that Plaintiff would have been fired. Plaintiff also lied, under penalty of law, on her Security Clearance form and on her application for health insurance. In light of the seriousness of these misrepresentations, the sheer number of misrepresentations indicating Plaintiff's general disregard for the truth, the sensitivity of her position with Hercules as a Quality Control Inspector, and Hercules' reservation of the right to discharge any employee making a misrepresentation on an employment application, we conclude that Plaintiff's misconduct would have justified her termination.

Finally, Plaintiff claims that a genuine issue of material fact existed as to whether Hercules would have terminated Plaintiff if it had known of her misconduct. Hercules provided affidavits by company management personnel that Plaintiff would have been terminated immediately if the company had discovered Plaintiff's

misrepresentations. Hercules further supported this claim by relying on the language in Plaintiff's employment application that she may be terminated for any misrepresentations, as well as language in Hercules' procedure manual which demonstrated that termination based on Plaintiff's misconduct would have been consistent with company policy. Upon this showing, the burden shifted to Plaintiff to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324.

We conclude that Plaintiff failed to point to any evidence that created an issue of fact regarding whether Hercules would have fired Plaintiff had it known of her repeated misrepresentations. That portion of Plaintiff's evidence, which consisted of incidents involving other employees who were guilty of misconduct yet were not terminated, does not rebut Hercules' claim that Plaintiff would have been fired. Plaintiff has presented no evidence that Hercules failed to terminate an employee for misconduct equivalent to her series of misrepresentations. Plaintiff's evidence of employee misconduct involving unexcused absences, tardiness, and sleeping while on duty are simply unrelated to Plaintiff's misconduct. Moreover, Plaintiff's evidence of misrepresentations by other employees involved relatively minor infractions such as false statements concerning an employee's whereabouts while on duty, not such serious matters as false statements on an employment application, a Security Clearance form, or false statements leading to unwarranted health insurance coverage for a dependant. Furthermore, Hercules' stated policy that violations occurring more than twelve months prior to a current

violation should not be considered in determining the disciplinary action for the current violation also does not help Plaintiff. This policy statement refers only to violations occurring more than twelve months earlier that were *known* to Hercules. Plaintiff presented no evidence that Hercules had a policy of forgiving *unknown* violations more than twelve months old. Plaintiff has therefore failed to make "a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In summary, we conclude that, under *Summers*, Hercules' after-acquired evidence of Plaintiff's misconduct precludes Plaintiff from obtaining relief for her termination. This is so because Hercules successfully demonstrated that it did not know of Plaintiff's misconduct when she was terminated, it would have been justified in terminating Plaintiff for the misconduct, and it would, in fact, have terminated Plaintiff had it known of her misconduct.[3]

AFFIRMED.

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[3] In light of our holding, we do not address Hercules' alternative argument that it would not have hired Plaintiff had it known of her employment application misrepresentations.